The Commission's conclusion in the *Connecticut 271 Order* is equally applicable here. SWBT stopped offering consumers and ISPs services that they valued solely to reduce local competition and harm competitors. From an economic perspective, SWBT would logically have been expected to *welcome* the opportunity to resell DSL to CLECs who provide voice service. By reselling DSL at the avoided cost discount, SWBT would receive the same profit from that service as it would receive from a direct sale to a retail customer, without being required to pay for the avoided costs.[84] SWBT's effort to avoid reselling DSL is thus contrary to SWBT's self-interest, and makes economic sense only given the advantages of suppressing competition for both local voice and advanced services.

SWBT's transparent effort to bring itself within the resale exception recognized in the *Second Advanced Services Order* is misguided for yet another reason.[85] In the *Advanced Services Order,* the Commission acknowledged that a pure wholesaler who dealt at arms length only with *unaffiliated* ISPs would not thereby incur any obligation to provide wholesale DSL transport to competitors.[86] The Commission never approved the kind of shell-game that SBC is now playing throughout its region, where it is attempting to shield itself from any resale obligation through the convenient expedient of using a wholly owned ISP to provide DSL to its

[84] Indeed, to the extent that SWBT paid any part of the cost of the loop as part of the DSL service, it would receive a "double benefit" from the resale of DSL to a UNE-P or UNE loop voice provider, because the CLEC is paying the full price of the loop.

[85] *See* SWBT AR/MO Br. at 54-57 (asserting that, in the relationship between ASI and ISPs, the "various indicia of a retail offering" identified in the *Second Advanced Services Order* are not present); *id.* at 59 (stating that "The relationship between ASI and SBIS is analogous in many respects to the relationship between ASI and the unaffiliated ISPs identified in the previous section").

[86] For example, the *Order* placed particular reliance on a Verizon tariff requiring that the ISP "provi[de] all CPE and wiring to its end-users, provide customer service directly to the end-users, and assume sole responsibility for *marketing, ordering,* installation, maintenance, repair, *billing and collections* vis-à-vis the end-user subscriber." *Second Advanced Services Order* ¶ 15 (emphasis added). In this case, contrary to the ISPs that the *Order* cited, SWBT, rather than its ISP affiliate, performs the key functions of marketing, ordering, billing, and collections vis-à-vis the end-user subscribers of SBIS. *See* Finney Decl. ¶¶ 25-29.

local voice customers. This gross abuse of SBC's local monopoly is itself a fully sufficient reason to deny the joint application.

But SWBT's discriminatory conduct goes further still. SWBT discriminates against unaffiliated ISPs in myriad ways. First, SWBT performs significant services for Southwestern Bell Internet Services ("SBIS"), its ISP affiliate, that it is not performing or claims it soon will not perform for unaffiliated ISPs. SWBT will abandon split-billing for ISPs, but continue to perform direct billing for SBIS. SWBT AR/MO Br. at 60; Habeeb Aff. ¶ 37 (failing to mention that unaffilliated ISPs can use SBIS generic billing agreement); *see also* SWBT AR/MO Br. at 60 (describing generic contract as between SWBT and "interchange carriers and other product carriers").[87]

Second, SWBT markets SBIS's services, and solicits and accepts orders for SBIS, pursuant to a joint marketing agreement between SWBT and SBIS. SWBT AR/MO Br. at 59; Habeeb Aff. ¶ 35. As part of that agreement, SWBT's personnel "receive customer inquiries for SBIS's high-speed DSL Internet access product, verify whether the prospective customer meets the criteria for service that SBIS has established, and transmit customer ordering information directly to SBIS." SWBT AR/MO Br. at 59-60. SWBT provides no such arrangement for other ISPs. SWBT's performance of important billing, collection, and marketing functions for SBIS

[87] Perhaps in recognition of the discriminatory nature of its direct billing service for SBIS, SWBT suggests that it would be willing to contract with unaffiliated ISPs "lacking the systems capability to handle this billing" to perform the billing function on their behalf. Habeeb Aff. ¶ 28 & Att. D at 2. However, SWBT provides no description of the terms and conditions that would govern such an arrangement – including the charge it would assess for those services. In fact, SWBT does not even assert that those terms and conditions would be the same as those in its contract with SBIS. In any event, SWBT's offer itself is clearly discriminatory, since it is limited to "ISPs lacking the systems capability to handle . . . billing" – not to all ISPs.

gives SBIS a significant advantage over its ISP competitors, because it enables SBIS to avoid the substantial costs that unaffiliated ISPs must incur to perform the same functions.[88]

Third, in connection with its recent requirement that all unaffiliated ISPs have written agreements with ASI by the end of September 2001, SWBT has prepared "Proposed Terms and Conditions" that: (1) specify the exact price to be paid for DSL Transport by the ISPs; (2) require that the ISPs perform marketing, billing, and ordering – the functions that SWBT performs for SBIS – as well as customer service and repair; and (3) require the ISP to provision all customer premises equipment and to provide Virtual Path/Virtual Connection ("VP/VC") information to ASI. *Id.* & Att. A. In addition, SWBT is requiring new unaffiliated ISPs to sign a "DSL Addendum" that not only contains these "clarifications" imposing numerous costs on the ISP, but sets forth provisions that would allow ASI to market and provision lucrative enhanced services on the same line directly to the ISP's own customers.[89]

In short, SBC is free to dictate highly discriminatory terms to the ISPs, who increasingly have fewer choices of partners to whom to turn for DSL transport service. By denying competitors the ability to resell DSL, SWBT helps ensure that it will have maximum leverage over unaffiliated ISPs, an advantage that SBIS can leverage to the hilt. This discrimination squarely violates the Communications Act, which requires that an ILEC must nonetheless comply with its "basic common carrier obligations with respect to these services," including "providing such DSL services upon reasonable request; on just, reasonable, and

[88] Although SWBT contends that "SBIS pays SWBT for soliciting and accepting orders for SBIS," it fails to describe the amount of that payment. *See* Habeeb Aff. ¶ 35.

[89] *See* Habeeb Aff., Att. B. Section 2(G) of the "DSL Addendum" specifically provides that ASI "may, at its own discretion, provision other applications on the same line that is carrying [the ISP's] virtual session to the End User location and may fully market such applications and related services." *Id.* In other words, this provision would give SWBT (through ASI and its data affiliates, who are parties to the Addendum) the right to sell such enhanced services as video on demand, video conferencing, and e-commerce applications directly to the ISP's customers and provision them on the same line as the DSL.

nondiscriminatory terms; and in accordance with all applicable tariffing requirements."[90] Thus, "all carriers have a firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive internet or other advanced service providers."[91] In addition, any discrimination in pricing, terms, or conditions that "favor one enhanced service provider over the other" is regarded by the Commission as an unreasonable practice, in violation of Section 201(b) of the Act.[92] Thus, the Commission has required ILECs to provide DSL to ISPs on an "unbundled" basis and on reasonable and nondiscriminatory terms.[93]

For these reasons, SWBT's efforts to avoid its obligation to provide wholesale DSL transport to competitors have simply compounded its discriminatory conduct against both local voice competitors and unaffiliated ISPs.

Finally, even leaving aside its failure generally to make DSL transport available at a wholesale discount, SWBT's highly restricted offer of wholesale DSL fails to comply with other requirements of Section 251(c). The terms of its interconnection agreement with Logix Communications Corporation ("Logix") (*see* SWBT AR/MO Br. at 143-144), illustrate the point:

- The ASI/Logix agreement states only that ASI will offer CSAs to any "similarly situated" customer that meets the terms and conditions of that particular arrangement. Neither SWBT's application nor the Logix agreement sets forth any criteria for determining when a customer is "similarly situated," or specifies whether a reseller may aggregate the volumes of its individual customers to meet the volume requirements of a particular CSA.[94]

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[90] *Second Advanced Services Order* ¶ 21.

[91] *See Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-61 and 98-183, Report and Order released March 30, 2001, ¶ 46 ("*Unbundling Order*").

[92] *Unbundling Order* ¶ 46.

[93] *Id.* ¶¶ 39, 43.

[94] *See* Finney Decl. ¶ 32. The Commission has held that that a BOC's requirement that customers be "similarly situated" is presumptively unreasonable to the extent that it "require[s] individual customers of a reseller to comply with the incumbent LEC's high-volume discount minimum usage requirements so long as the reseller, in aggregate, under the relevant tariff, meets the minimal level of demand." *Second Louisiana 271 Order* ¶ 317. *See also Local Competition Order* ¶ 953. The Commission has also held that an applicant for Section 271 authority must make "an (continued)

- The Logix agreement provides that the end-user of a CSA "may be subject to" termination liability if it elects to terminate its service with ASI. Because the Commission has stated that termination liability provisions may be inconsistent with the requirements of Section 271, depending on the circumstances, the legality of the termination liability under ASI's CSAs cannot be presumed.[95]

- ASI has also attached unreasonable conditions to its obligations. For example, the Logix Agreement provides that services are subject to resale under the agreement "only where there is existing capacity on SBC-ASI's deployed facilities to provide the services." Finney Decl. ¶ 34. ASI can thus avoid its resale obligations simply by limiting its capacity to the level necessary to serve its present retail customers. *Id.*

- In addition, SWBT has improperly attempted to limit ASI's obligation to provide nondiscriminatory access to its OSS. The Agreement makes clear that CLECs will be required to use ASI's own unique OSS (and cannot use SWBT's OSS) to order advanced services from ASI – and that ASI will provide resellers with electronic access to its OSS only for some services. *Id.* ¶ 36. Forcing resellers to use ASI's OSS is discriminatory, since SWBT does not assert that orders from ASI customers for services other than DSL Transport are subject to the same degree of manual intervention that will occur when a reseller orders the same service. *Id.* ¶ 37.

- Finally, the Logix Agreement limits ASI's liability for improper installation and maintenance of the resold services that it *does* provide to a refund of "the proportionate charge for period during which the service was affected," and expressly protects ASI from liability for any other damages, including lost profits and lost revenue. *Id.* ¶ 35. In short, if ASI improperly installs or maintains a service for the CLEC, the CLEC's recovery for the improper installation or maintenance is limited to a refund of its payment to ASI – regardless of the revenues that the CLEC loses or the damage to its reputation that the CLEC incurs. *Id.* This is clearly unreasonable.

The discriminatory and unreasonable terms of the ASI/Logix Agreement are thus yet another reason why SWBT fails to satisfy the checklist with respect to advanced services.

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affirmative showing" that any restrictions on volume aggregation are reasonable. *Second Louisiana 271 Order* ¶ 317. Plainly, SWBT has not done so.

[95] *See* Finney Decl. ¶ 33; *New York 271 Order* ¶ 390 ("Although termination liabilities that apply when a customer terminates a contract to take service from another provider could, in certain circumstances, be unreasonable or anticompetitive, they may not on their face put a carrier out of compliance with checklist item 14"); *South Carolina 271 Order* ¶ 222 ("Because, depending on the nature of these [termination] fees, their imposition creates additional costs for a CSA customer that seeks service from a reseller, they may have the effect of insulating portions of the (continued)

B. SWBT Has Not Demonstrated That It Provides Line Sharing Over Fiber-Fed Loops.

1. SWBT Fails To Provide End-to-End Line Sharing to CLECs Over Hybrid Fiber/Copper Loops.

The *Line Sharing Reconsideration Order* clarifies that an ILEC must provide line sharing over fiber facilities as well as copper, and requires that an ILEC must provide access to line sharing at either the central office or the remote terminal, at the CLEC's request. *Line Sharing Reconsideration Order* ¶ 10. It also indicates that a CLEC must have the option to access hybrid fiber-copper loops at either the remote terminal or the central office, "not [the location] that the incumbent chooses as a result of network upgrades entirely under its own control." *Id.*, ¶ 11. SWBT does not provide CLECs this required access.[96]

SWBT argues that the *Line Sharing Reconsideration Order* does not obligate it to provide unbundled access to line sharing over hybrid fiber-copper loops at the central office. *See* SWBT AR/MO Br. at 112-13. SWBT's argument, however, is completely inconsistent with two fundamental legal principles that have guided the Commission's definition of the loop as an unbundled network element. First, the Commission has recognized that the loop provides essential transmission functionality needed for a customer to send and receive telecommunications signals between his location and a centralized point in the serving ILEC central office where it is technically feasible for a CLEC to connect to the loop facility.[97]

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market from competition through resale. We, therefore, would want to review such fees and request that BOCs provide information justifying the level of cancellation or transfer fees in future applications").

[96] Equally significant, the Commission found that line splitting must be provided to UNE-P CLECs on terms and conditions equivalent to line sharing, without creating discriminatory excess costs or service disruption. *Line Sharing Reconsideration Order*, 18-23. Thus, SWBT must also provide line splitting to CLECs over fiber-fed, DLC-equipped loops.

[97] *See* 47 C.F.R. § 51.319(a)(1) ("[t]he local loop network element is defined as a *transmission facility* between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises") (emphasis added).

Second, the Commission has always recognized that the local loop, like all network elements, is defined by its functionality and is not limited to particular services or technologies.[98] Indeed, the *Line Sharing Reconsideration Order* (¶ 10) clearly reiterates that principle, noting that the definition of the loop itself as a "transmission facility" was "specifically intended to ensure that this definition was technology-neutral."

SWBT's hybrid fiber-copper loops, which are being deployed to provide its customers with access to both voice and data services, are not immune from application of these fundamental principles. For example, SWBT has made it clear that competitors can access DS1 and ISDN loops over Project Pronto facilities. MOPSC Hearing Tr. at 551-552. Similarly, SWBT readily acknowledges its obligation to provide competitors seeking to provide voice services over its Project Pronto facilities with unbundled access to hybrid fiber-copper loops. MOPSC Tr. at 543-44.[99] These admissions, although fully consistent with the Commission's determination that loop unbundling obligations necessarily extend to hybrid fiber-copper loops,[100] cannot be squared with SWBT's refusal to provide end-to-end line sharing over such loops. Pursuant to the Commission's technology- and service-neutrality principles, SWBT's obligation to provide a competitor with unbundled access to hybrid fiber-copper loops at the central office for ISDN, DS-1 and voice services must extend to the telecommunications signals that competitors need to provide DSL services via line sharing over those same loops.

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[98] *See UNE Remand Order* ¶ 167 ("[o]ur intention is to ensure that the loop definition will *apply to new as well as current technologies*, and to ensure that competitors will continue to be able to access loops as an unbundled network element as long as access is required") (emphasis added); *Local Competition Order* ¶ 292 ("section 251(c)(3) requires incumbent LECs to provide requesting carriers with all of the functionalities of a particular element, so that requesting carriers can provide *any telecommunications services* that can be offered by means of the element") (emphasis added).

[99] In fact, the line card deployed as part of Project Pronto is as much a part of the transmission pathway for the voice communication as it is for the DSL connection. *See* Finney Decl. ¶ 45. It simply cannot be that the line card *is* properly part of the loop when the loop is used for voice service but is *not* part of the loop when the loop is used for DSL service.

SWBT attempts to meet "all of its line sharing obligations" by permitting CLECs to access the high-frequency portion of the copper portion of the loop in two ways: (1) by provisioning all-copper loops, where available; and (2) by permitting a CLEC to collocate a DSLAM at or near the central office and utilize dark fiber or fiber feeder subloops. *See* SWBT AR/MO Br. at 112-113. But SWBT's "all-copper" loop proposal is not an adequate substitute for line sharing over hybrid fiber-copper loops, because it relegates competitors to use only the aged, all-copper plant that SWBT finds inadequate for its own purposes. *See* Finney Decl. ¶¶ 56-58.

Similarly, SWBT's requirement that a CLEC collocate a DSLAM at the remote terminal in order to satisfy its obligation to provide line sharing over hybrid fiber-copper loops conflicts with the *Line Sharing Reconsideration Order* (¶ 11), which stated that a competitor should not have to collocate a DSLAM at the ILEC's remote terminal in order to gain access to line sharing over fiber-fed subloops. The availability of subloop unbundling has no impact on the ILEC's obligation to provide line sharing functionality over the "entire loop, even where the incumbent has deployed fiber in the loop." *See Line Sharing Reconsideration Order* ¶ 10.

SWBT also claims that so long as it provides one or both of these alternatives, it is not required to unbundled certain remote terminal electronics, which SWBT's considers a form of "packet switching" functionality, pursuant to conditions set forth in the *UNE Remand Order*, SWBT AR/MO Br. at 113-14. But as AT&T has elsewhere explained, the electronics associated with SWBT's upgraded loop architecture provide core transmission functionality (multiplexing, etc.) that is not, and cannot, be considered packet switching.[101] No competitor –

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[100] *See, e.g., Local Competition Order,* ¶ 383.

[101] *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability,* 2nd FNPRM in CC Docket No. 98-147, 5th FNPRM in CC Docket No. 96-98, AT&T Comments at 44-47 and Declaration of Joseph P. Riolo, ¶¶ 44-47 (attachment to AT&T's Comments), AT&T Reply, at 46-49 (filed Nov. 14, 2000); *see also* 3rd (continued)

even one that has provisioned its own packet switch in the central office – can provide voice or data services unless it has access to its customers' telecommunication signals. Such signals are delivered over the "entire loop" element, which necessarily includes all of SWBT's facilities between the customer's premise and its central office. SWBT, however, is attempting to expand a minor exemption in the *UNE Remand Order* to frustrate a competitor's access to unbundled loop for line sharing purposes when SWBT deploys Project Pronto. *See* Finney Decl. ¶ 40. In doing so, SWBT is using its upgraded loop architecture -- which is entirely under its own control – to dictate the access point for line sharing over fiber-fed loops at the remote terminal. SWBT's actions violate Paragraph 11 of the *Line Sharing Reconsideration Order*.

SWBT's interpretation of its obligations under the *Line Sharing Reconsideration Order* rests, at bottom, on an unlawful service- and technology-based distinction between the unbundling of underlying transmission functionality associated with voice and advanced telecommunications services. Neither the Act nor the Commission's prior rulings permit any distinction between the transmission functionality used to provide certain types of telecommunications services, such as DSL, from that used to provide voice services between the customer's premises and the central office.

2. The Commission's Unbundled Packet Switching Rules Do Not Preclude Unbundling of Project Pronto Network Elements.

Even if, arguendo, the electronics associated with SWBT's upgraded loop architecture were subject to the Commission's rules regarding "packet switching," the severe limitations associated with SWBT's all-copper loops and RT-based collocation alternatives, coupled with the general characteristics of the Project Pronto architecture, mean that even under

FNPRM in CC Docket No. 98-147, 6th FNPRM in CC Docket No. 96-98, AT&T Comments at 11-14 (filed Feb. 27, 2001).

the *UNE Remand Order* exception, unbundling of these electronics will be required in virtually all circumstances where SWBT has deployed hybrid fiber-copper loops.

Specifically, the Commission requires ILECs to unbundle packet switching where the following conditions are satisfied:

(i) The ILEC has deployed DLCs, including but not limited to, IDLC or UDLC systems; or has deployed any other system in which fiber optic facilities replace copper facilities in the distribution section (*e.g.*, end office to remote terminal, pedestal or environmentally controlled vault);

(ii) There are no spare copper loops capable of supporting the xDSL services the requesting carrier seeks to offer;

(iii) The ILEC has not permitted a requesting carrier to deploy a DSLAM at the remote terminal, pedestal or environmentally controlled vault or other interconnection point, nor has the carrier obtained a virtual collocation arrangement at these subloop interconnection points as defined by § 51.319(b); and

(iv) The ILEC has deployed packet switching capability for its own use.[102]

Contrary to SWBT's claims (Chapman MO Aff. ¶¶ 120, 147-148, AR Aff. ¶¶ 120, 147-148), all four conditions are satisfied. First, SWBT has deployed DLC or NGDLC in which fiber optic facilities have been introduced in the distribution section. *See* Finney Decl. ¶ 55. Second, spare copper loops are not always available, and even when they are, the quality of service is far poorer, especially in distance-sensitive applications such as line sharing, than what fiber loops provide. *Id.* ¶¶ 56-58. Third, the physical, technical, and economic limitations associated with SWBT's vague RT-based collocation alternative make clear that competitors will rarely, if ever, be permitted to collocate their DSLAMs in SWBT's remote terminal on a nondiscriminatory basis. *Id.* ¶¶ 59-60.[103] Texas and Illinois decisionmakers have already declared that SBC's design for Project Pronto – which is the same in all 13 SBC states – denies

[102] 47 C.F.R. § 51.319(c)(5); *UNE Remand Order* ¶ 313.

competitors remote collocation of DSLAMs in a commercially reasonable manner.[104] Finally, the ILEC is clearly deploying so-called "packet switching" for itself and its affiliate. *Id.* at ¶¶ 62-64. Accordingly, as proceedings in Texas and Illinois confirm, SWBT is required to unbundle any so-called "packet switching" functionality when provisioning line sharing through Project Pronto. *See* Texas Arbitration Award at 75-80; Illinois Proposed Order at 32-33.

3. SWBT's Broadband Service Offering Also Denies Unbundled Access to Line Sharing.

SWBT's willingness to let competitors resell SWBT's "broadband service" does not obviate its obligation to provide line sharing over hybrid fiber/copper loops. This resale offer does not provide competitors with unbundled access to line sharing in the manner contemplated by the *Line Sharing Reconsideration Order*, and does not comport with the mandate of section 251(c)(3) to provide unbundled network elements on a nondiscriminatory basis.

The Commission has long recognized that incumbents must make available all three of the entry methods established for competitors in the 1996 Act. Making entry available through resale thus does not relieve an incumbent of the duty to offer a UNE.[105] Indeed, the Commission has explicitly held that "allowing incumbent LECs to deny access to unbundled elements solely, or primarily, on the grounds that an element is equivalent to a service available at resale would lead to impractical results; incumbent LECs could completely avoid section

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[103] The Commission itself recently recognized this fact in the *Line Sharing Reconsideration Order*, stating that as fiber deployment by ILECs is increasing, "collocation by competitive LECs at remote terminals is likely to be costly, time consuming and often unavailable." *Line Sharing Reconsideration Order*, ¶ 13.

[104] *Petition of IP Communications to Establish Expedited PUC Oversight Concerning Line Sharing Issues, Petition of Covad et al Against SWBT for Post-Interconnection Dispute Resolution and Arbitration Under the Telecommunications Act of 1996 Regarding Rates, Terms, Conditions and Related Arrangements for Line Sharing*, TPUC Docket Nos. 22168, 22469, Arbitration Award at 72 (July 13, 2001) (Texas Arbitration Award); *Illinois Bell, Proposed Implementation of High Frequency Portion of Loop (HFPL)Line Sharing Service*, Ill PUC Docket No. 00-393, Proposed Order on Rehearing at 33 (Aug. 10, 2001) (Illinois Proposed Order).

[105] *See Local Competition Order*, ¶ 12; *UNE Remand Order*, ¶¶ 5, 67; *see also Iowa Utils. Bd. v. FCC, supra*, at 809.

251(c)(3)'s unbundling obligations by offering unbundled elements to end users as retail services."[106] And in any event, no CLEC can build a business plan on a service that SWBT can simply make disappear. *See* Finney Decl. ¶ 65-68.

4. Enforcement Of Existing Statutory Unbundling Requirements Will Not Impair Project Pronto.

Finally, SWBT's claim that a decision by the Commission requiring it to provide CLECs with end-to-end line sharing over hybrid fiber/copper loops will discourage investment in Project Pronto architecture is not credible.[107] Such an argument ignores the overall importance of the next-generation loop architecture in SBC's overall service plans, as well as the importance of Project Pronto to SBC's ability to meet growing consumer demand for multiple services. *See* Finney Decl. ¶¶ 70-73 (citing SBC Investor Briefings).

SBC's claims of network efficiency directly contradict SWBT's threat that it will discontinue deployment of Project Pronto. SBC has claimed to investors that it will attain "annual savings of $1.5 billion by 2004," that the "capital and expense savings pay for initiative on NPV basis,"[108] and that "[t]he network efficiency improvements alone pay for this [Project Pronto] initiative, leaving SBC with a data network that will be second to none."[109]

Despite SBC CEO Ed Whitacre's claims that unbundling Project Pronto in Illinois would cost "hundreds of millions of dollars,"[110] there is little additional cost associated with

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[106] *UNE Remand Order*, ¶ 67; *Iowa Utils. Bd. v. FCC*, 120 F.3d at 809 ("[w]hile subsection 251(c)(4) does provide for the resale of telecommunications service, it does not establish resale as the exclusive means through which a competing carrier may gain access to such services. We agree with the FCC that such an interpretation would allow the incumbent LECs to evade a substantial portion of their unbundling obligation under subsection 251(c)(3)").

[107] *See* Chapman MO Aff. ¶¶ 151-154, AR Aff., ¶¶ 151-154.

[108] SBC Investor Briefing, SBC Announces Sweeping Broadband Initiative, at 7 (October 18, 1999) (*Project Pronto Investor Briefing*).

[109] *Id.* at 2.

[110] *See* Chapman MO Aff., Attachment B, AR Aff, Attachment B (Letter from Ed Whitacre, SBC, to the Honorable J. Dennis Hastert, Speaker, U.S. House of Representatives (March 14, 2001)).

providing the line sharing (or line splitting) AT&T has requested. Finney Decl. ¶ 74. In any event, SBC's Chief Technology Officer already has admitted that SBC would have suspended Project Pronto in Illinois even if the cost to comply with the Illinois Commission's order was zero.[111] SWBT's true concern is not cost; but rather retaining the ability to leverage control of its bottleneck assets to extend its monopoly into other telecommunications services, such as DSL.

The Commission should thus reject allegations that SBC investment in Project Pronto facilities will end if the Commission enforces existing statutory unbundling obligations. "Without access to these loops, competitors would be at a significant disadvantage, and the incumbent LEC, rather than the marketplace, would dictate the pace of the deployment of advanced [telecommunications] services." *UNE Remand Order*, ¶ 90. As the Texas arbitration panel observed, SWBT's threat to pull back on Project Pronto if unbundling is required:

> in and of itself, provides clear and convincing evidence that SWBT continues to possess market power and can unilaterally determine who receives, and far more compelling, who does not receive broadband services . . . . If one company, in this case, SWBT, can unilaterally determine when and if citizens receive broadband service, it is up to this Commission to continue fostering competition by requiring element unbundling . . . .

Texas Arbitration Award at 80.

IV. SWBT STILL DOES NOT PROVIDE NON-DISCRIMINATORY ACCESS TO ITS OPERATIONS SUPPORT SYSTEMS.

Like the first Missouri 271 application, SWBT's current application has not shown that it fully complies with its obligation to provide non-discriminatory access to its OSS. As discussed below, SWBT fails to provide non-discriminatory access to its maintenance and repair systems because its systems are unable to update records for CLEC customers as promptly as for SWBT's customers.

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[111] *Illinois Bell, Proposed Implementation of High Frequency Portion of Loop (HFPL)Line Sharing Service*, Ill (continued)

A. SWBT Still Fails To Provide Nondiscriminatory Access To Maintenance and Repair Functions.

AT&T previously demonstrated that CLECs were being denied non-discriminatory access to SWBT's maintenance and repair functions as a result of problems with SWBT's Loop Maintenance Operations Systems ("LMOS"), which is the legacy system that SWBT uses to manage and process trouble tickets.[112] The LMOS database inventories network facilities throughout SWBT's five-state territory, and is used to perform line testing and various maintenance and repair functions. The database includes a record that indicates whether SWBT or a CLEC "owns" the circuit. Willard/Van de Water Decl. ¶¶ 8-10. If the record of a CLEC customer in LMOS is not updated at the time the CLEC submits a local service request to reflect the CLEC as the new "owner" of the circuit rather than SWBT, a CLEC will not be able to open a trouble report electronically for that line. *Id.* ¶ 11.

By SWBT's own admission, at the time of its first Missouri 271 application SWBT's systems were not updating LMOS records correctly for all lines served by CLECs. *Id.* ¶¶ 12-16. As a result, when CLECs attempted to submit trouble tickets electronically, SWBT's systems often responded that the telephone numbers had been "ported or disconnected" – even though the numbers were active accounts of the CLEC. *Id.* ¶¶ 12. In those cases, both the CLEC and SWBT had to process the trouble report manually. *Id.* ¶¶ 15-16.

SWBT now claims to have implemented "system enhancements and procedures" that have fixed the problem. SWBT AR/MO Br. at 63. But it has addressed, at best, only part of the problem. Its LMOS changes are designed to eliminate what SWBT calls the "out-of-sequence posting problem." *Id.* at 68. SWBT now tries to ensure that LMOS first receives a

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PUC Docket No. 00-393, Hearing Tr. 307-308.

"D" (disconnect) order (which removes the current service provider) before it receives a "C" (change) order (which inserts the new service provider and moves the account to SWBT's billing system). Willard/Van de Water Decl. ¶¶ 14-17; LMOS Aff., ¶¶ 10-12, 16-17. If LMOS does not post the orders in this sequence, the LMOS record will be placed into "disconnected" status, and a CLEC attempting to open a trouble ticket electronically will be unable to do so. Willard/Van de Water Decl. ¶ 15; LMOS Aff., ¶¶ 12-13.

The changes implemented by SWBT may have reduced the LMOS problem, but they have not eliminated it. First, SWBT itself acknowledges that even improper sequencing can still occur if, for example, the "D' order falls out for manual handling. LMOS Aff. ¶ 20 n.10, 27; Willard/Van de Water Decl. ¶ 18.

Second, improper sequencing was only part of the LMOS problem. CLECs can open trouble tickets electronically only if orders post in the proper sequence *and if both the "D" and "C" orders have been posted to LMOS.* The *timeliness* of the updating process is as critical to a CLEC's ability to open the trouble ticket electronically as is order-sequencing. *Id* ¶ 17.

AT&T's data show that SWBT's systems still fail to update LMOS records in a timely manner. On July 28, AT&T attempted to open trouble tickets for telephone numbers on Missouri UNE-P local service requests ("LSRs") for which AT&T had received service order completion notices ("SOCs") during the week of July 23 to July 28. AT&T was unable to open trouble tickets for any telephone number where the corresponding SOC was issued 3 business days or earlier. Even for LSRs for which a SOC had been issued more than 3 business days before, AT&T received responses for several of the numbers indicating that the LMOS record had not yet been updated. Willard/Van de Water Decl. ¶¶ 19-21 & Att. 1.

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[112] *See, e.g.*, Comments of AT&T (at 44-47) and Declaration of Walter W. Willard (¶¶ 9-29) filed April 24, 2001, in (continued)

Similar results occurred when AT&T attempted to open Missouri trouble tickets on August 29 for orders with completion dates of August 20 to August 28. Indeed, AT&T received messages indicating that the LMOS record had not been updated for some telephone numbers in LSRs that had been completed more than a week before. *Id.* ¶ 22 & Att. 2. Thus, SWBT's claims that 55 percent of "C" and "D" orders for UNE –P conversions "post correctly in LMOS on the night of installation," and that almost 75 percent of such orders post on the second day of conversion, conflicts directly with AT&T's experience. *See* SWBT AR/MO Br. at 75.[113]

Untimely updating in LMOS denies CLECs parity of access to maintenance and repair functions, because it denies them the same ability to submit trouble reports electronically that SWBT has in its retail operations. Willard/Van de Water Decl. ¶ 25. By its very nature, manual processing carries a higher risk of error than electronic processing. *See id.* ¶¶ 27, 29; *Second Louisiana 271 Order* ¶ 114 (finding that manual processes "generally are less timely and more prone to errors" than electronic processes); *South Carolina 271 Order* ¶ 120. Here, when an LMOS record is not updated, acceptance of the CLEC's trouble report by SWBT will be delayed to an extent not experienced by SWBT's retail operations. For example, unlike SWBT's retail operations, which submit trouble tickets electronically (and only once) for customers experiencing troubles, a CLEC must submit a trouble ticket twice – first electronically, then manually – when SWBT has not yet updated the corresponding LMOS record. Willard/Van de Water Decl. ¶ 27. After this delay in submission, further delay will

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CC Docket No. 01-88.

[113] The Ernst & Young report on which SWBT relies provides no basis for a finding that LMOS records are updated in a timely manner. Ernst & Young did not review the timeliness of the updating process, but focused instead on whether the "D" and "C" orders were being received by LMOS in the proper sequence and whether SWBT had updated its embedded base of LMOS records. *See* Willard/Van de Water Decl. ¶¶ 34; SWBT AR/MO Br. at iv, 63, 66-69; Kelly Aff., Atts. A, C. Even that limited review was patently inadequate to determine whether SWBT had fully corrected the LMOS updating problem. Willard/Van de Water Decl. ¶¶ 33-36.

occur if (as has often occurred when AT&T has phoned in trouble tickets) SWBT disputes that the CLEC is the true "owner" of the circuit. *Id.* ¶ 28.

SWBT's rationalization that it resolves manually submitted trouble tickets faster than electronically submitted tickets (SWBT AR/MO Br. at 72) is illogical and contrary to fact. Willard/Van de Water Decl. ¶ 26. SWBT's own data demonstrate that its assertion is not true with respect to trouble tickets. LMOS Aff., Att. I-1 – I-3.

The inability of CLECs to submit a trouble ticket electronically puts CLECs at a significant competitive disadvantage, because that inability occurs when, or immediately after, a customer migrates from SWBT, which is when the customer is most likely to experience troubles. *Id.* ¶ 32. Customers expect their new carrier to arrange repairs as quickly as SWBT does, and will blame any delays or errors in the repair service resulting from the manual submission of a trouble report on the CLEC, not SWBT. *Id.* The resulting customer dissatisfaction and reputational damage will lead to loss of customers, and will increase as CLECs ramp up for market entry. *Id.* ¶¶ 31-32.

In addition to denying CLECs parity of access, the failure of SWBT to update LMOS records decreases the accuracy of SWBT's reported performance data. SWBT itself describes LMOS as "one of the primary data sources relied upon to develop SWBT's maintenance performance measurement results" for UNE-P. *See* Dysart AR Aff. ¶ 113; Dysart MO Aff. ¶ 121. When a trouble report submitted by a CLEC is improperly recorded or not recorded in LMOS, the report will not be included in SWBT's reported data for trouble report rates for CLECs – thereby understating the actual rates. Willard/Van de Water Decl. ¶¶ 37-38. And because LMOS records that have not been correctly updated list SWBT as the "owner" of the facilities, the trouble report rate for SWBT's retail operations may be overstated. *Id.* ¶ 38.

SWBT's own "mathematical analysis" proves that these LMOS updating problems caused SWBT to report its performance data inaccurately. SWBT admits that, when restated to reflect LMOS updating errors, the data for certain measurements for three States (including Missouri) "shifted from in parity to out of parity." *See id.* ¶ 14; LMOS Aff. ¶¶ 58-60 & Att. L. And SWBT's "analysis" almost certainly understates the true extent of the inaccuracy, because SWBT excluded four performance measurements that concededly use the LMOS database to report data. Willard/Van de Water Decl. ¶¶ 41-43.[114]

The full extent and impact of the errors will be determined, if at all, only through the independent third-party audit of SWBT's Texas data ordered by the TPUC. *Id.* ¶¶ 39, 42-43. Such review is essential given other evidence that SWBT inaccurately reports its data. *See* Willard/Van de Water Decl. ¶¶ 46-53. For example, as the TPUC also has recognized, SWBT has erroneously reported its flow-through rates (PM 13) by refusing to follow the plain language of its business rules.[115] *See id.* ¶¶ 47-53; SWBT AR/MO Br. at 96-97; Lawson MO Aff. ¶ 179. SWBT's unreliable performance reports further confirm its failure to provide nondiscrimatory access to OSS.

[114] Even though SWBT represented to the TPUC last April that eight separate performance measurements utilize the LMOS database for data reporting purposes, it limited its "mathematical analysis" to only four of them. *See* Willard/Van de Water Decl. ¶¶ 37, 42-43. SWBT's explanation for its failure to include the remaining four measurements in its analysis is inconsistent with its previous representation and factually incorrect. *See id.* ¶ 43; LMOS Aff. ¶¶ 58-59. Indeed, SWBT did not include in its "analysis" any performance measurements even though, according to a filing SWBT made August 1 with the TPUC, at least one such measurement is reported from LMOS. The TPUC found that, in view of the August 1 filing, SWBT had previously misrepresented the impact of LMOS on performance measurements involving line sharing and TPUC ordered its auditor to review *all* line sharing performance measurements for possible impact as a result of the LMOS problem. *See* Proposed Order No. 37, approved September 5, 2001, in TPUC Project No. 20400; Williard/Van de Water Decl. ¶ 43.

[115] *See* Willard/Van de Water Aff. ¶¶ 47-48, 50; Order No. 33, Approving Modifications To Performance Remedy Plan and Performance Measurements, issued June 1, 2001, in TPUC Project No. 20400, Matrix at 78 ("The Commission finds that SWBT has not implemented PM 13 in accordance with the Business Rule, in that it has excluded UNE-P orders that are not MOG-eligible").

V. SWBT CANNOT PROCEED UNDER "TRACK A" IN ARKANSAS.

Apart from checklist noncompliance, SWBT's application for Arkansas should be denied because SWBT has failed to meet the threshold requirements of Track A, section 271(c)(1)(A). To satisfy Track A, a BOC must have interconnection agreements with one or more "competing providers" of telephone exchange service "to residential and business subscribers.'" 47 U.S.C. § 271(c)(1)(A). SWBT fails to meet this requirement.

Both the Commission and the D.C. Circuit have made clear that to be "competing providers," competitors must be shown to be actually serving sufficient numbers of facilities-based residential and business customers respectively to constitute "an actual commercial alternative to the BOC" in at least some part of the state. *Oklahoma I 271 Order,* ¶ 14, *aff'd, SBC Commun. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998). When SWBT first sought Section 271 authorization in Oklahoma in 1997, it relied on a single CLEC to satisfy Track A. The Commission denied SWBT's application, citing the CLEC's unrebutted representation that it had only four customers and was "not accepting any request in Oklahoma for residential service." *Oklahoma I 271 Order*, ¶ 20 ("we cannot conclude for purposes of section 271(c)(1)(A) that a carrier is a competing provider of telephone exchange service to residential subscribers if it is not even accepting requests for that service"). The D.C. Circuit affirmed. *SBC Commun.*, 138 F.3d at 416.

SWBT's Track A showing for Arkansas is deficient in precisely the same way. SWBT argues that two CLECs, ALLTEL and Navigator, satisfy the Track A requirement. SWBT AR/MO Br. 10. As the APSC has reported, however, both ALLTEL and Navigator have ceased provision of facilities-based residential service in Arkansas. In its December 21, 2000 Report, the APSC stated:

> At this time ALLTEL is the only facilities-based CLEC serving residential customers, and 2,025 (44%) of ALLTEL's residential customers are employees of ALLTEL. At the beginning of the public hearing herein, ALLTEL publicly announced that it would discontinue offering residential CLEC service in Arkansas on the basis of cost considerations. Existing residential customers will be able to continue ALLTEL service only at their present location. ALLTEL will no longer serve or compete in any way for new residential customers.[116]

Similarly, in its May 21, 2001 Report, the APSC stated:

> Navigator indicated [at the hearing held on April 20, 2001] that it had also discontinued the offering of UNE-based residential service in Arkansas stating that it had begun an experiment in deploying UNE-based residential service but found SWBT's 'assessment of unexpected, inapplicable and even hidden non-recurring charges -- associated with UNE provisioning – has rendered the provisioning of UNE-P service in Arkansas economically unfeasible for Navigator.[117]

Thus, based on the unrefuted statements of the two CLECs identified by SWBT, there is clearly no "actual commercial alternative" for facilities-based residential service in Arkansas. The Commission's decision that "we cannot conclude for purposes of section 271(c)(1)(A) that a carrier is a competing provider of telephone exchange service to residential subscribers if it is not even accepting requests for that service," (*Oklahoma I 271 Order*, ¶ 20), is dispositive of the Track A issue in this case.

Recognizing this fact, SWBT has advanced two fall-back arguments with respect to the Track A issue. First, SWBT argues that three other carriers -- WorldCom, Logix and McLeod – provide facilities-based service to both business and residential customers in Arkansas. SWBT AR/MO Br. 13. SWBT's claim as to WorldCom is refuted by WorldCom's own statement before the APSC:

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[116] *Consultation Report* at 5.

[117] *Second Consultation Report* at 4.

> Brooks Fiber (a CLEC subsidiary of WCOM) is not providing facilities-based residential service in Arkansas. Nor is Brooks providing residential service as a reseller. Notwithstanding the assertions of SWBT witness Smith, Brooks is providing only facilities-based business service in Arkansas.[118]

The APSC's Report again makes clear that the two remaining CLECs cited by SWBT do not provide an "actual commercial alternative" for SWBT residential service: "The two (2) remaining CLECs identified in Mr. Smith's proprietary response affidavit are, according to the affidavit, together providing residential service to sixty-nine (69) customers." *Id.* Accordingly, the PSC concluded that "the contested statements in the record do not support a finding that there is competition for new residential customers." *Id.* at 6.

Although the Commission has concluded that it will not "require any specified level of geographic penetration by a competing provider" with respect to Track A,[119] the Commission has also recognized that "there must be an actual commercial alternative to the BOC in order to satisfy Section 271(c)(1)(A)."[120] Although the Commission has never had to define precisely the level of CLEC facilities-based activity so *de minimis* such that it does not satisfy the requirements of Track A, the Commission has explicitly recognized that "there may be situations where a new entrant may have a commercial presence that is so small that the new entrant cannot be said to be an actual commercial alternative to the BOC, and therefore, not a 'competing provider.'"[121] Wherever the line may be drawn, it is clear that, in the absence of any statement by, or other indication regarding, Logix and McLeod that they are actively seeking

[118] *Second Consultation Report* at 4 (quoting WorldCom comments).

[119] *See Michigan 271 Order* ¶ 76.

[120] *Oklahoma I 271 Order* ¶ 14.

[121] *Michigan 271 Order* ¶ 77.

residential customers,[122] SWBT's assertions that they serve 69 such customers cannot reasonably satisfy its burden of establishing the existence of an "actual commercial alternative" for residential consumers in Arkansas.

SWBT's second fall-back argument is that it can satisfy Track A even if there are *no* facilities-based competitors for residential service in Arkansas, so long as there are resellers that offer residential service. This claim fails, however because the requirement for "facilities-based" competition in Section 271(c)(1)(A) applies independently to both classes of customers identified in the statute – business and residential – *as a matter of law.*

First, in order to qualify as a Track A competing provider, a carrier must be providing at least some facilities-based service. The first sentence of 47 U.S.C. § 271(c)(1)(A) makes that much absolutely clear.[123] It requires that the BOC show that it is "providing access and interconnection *to its network facilities for the network facilities* of one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers." *Id.* (emphasis added). A pure reseller of telephone exchange service has no network facilities. Thus, section 271(c)(1)(A), on its face, unambiguously excludes consideration of any such pure resellers as competing providers. Accordingly, SWBT's reliance on the existence of such pure resellers (*see* SWBT AR/MO Br. at 13-14 & Smith AR Aff. Attach. C. at 3) has no relevance to the showing required under Track A.

Second, in order to qualify as a Track A competing provider, a carrier also must meet the minimum requirement of the second sentence of Track A, which is that it be providing

[122] The service map on Logix's web-site (www.logixcom.com/other/netmap.htm) does not reflect any residential service offering in Arkansas.

[123] Indeed, in the *Louisiana II Order*, the Commission assumed that the Track A competitor would be predominantly facilities-based at least as to one category of subscribers, as did the BOC commenters whose comments were summarized by the Commission. *See Louisiana II Order* ¶¶ 46-48 & n.131.

"such telephone exchange service" at least "predominantly" over its "own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier." 47 U.S.C. § 271(c)(1)(A). Out of the five CLECs that SWBT relies on by name in its application, only one – Navigator – is currently marketing local service both to residential and business customers. Navigator, however, is not "predominantly" a facilities-based carrier to *any* class of customers. SWBT's evidence shows that Navigator serves more residential customers via resale than it serves business *and* residential customers via facilities or UNEs. *See* Smith Aff. Att. E, Table A. Navigator, therefore, is "predominantly" a "reseller" under any rational definition of the statutory terms. Thus, even if section 271(c)(1)(A) is interpreted (as the Commission has previously suggested) as permitting the Commission to evaluate whether a given CLEC, "as a whole" is predominantly facilities-based, Navigator fails to meet that test.[124]

Navigator fails to qualify as a competing provider for yet another reason. Navigator has expressly stated that under the existing terms and conditions that SWBT has set in Arkansas, Navigator cannot provide service to residential customers on a facilities-basis. It has thus not made a mere "business" decision to provide through resale a service that it could otherwise provide on a facilities-basis; rather, it has attempted to provide such facilities-based service, and learned that SWBT's anticompetitive charges and tactics make such service "economically infeasible." Navigator's experience proves – directly contrary to the plain language of Track A – that facilities-based service is not and cannot viably be offered today to

[124] It is AT&T's position that Track A requires at least one carrier to be predominantly facilities-based for each class of customer, business and residential The explicit reference in the second sentence to "such telephone exchange service" (especially set out as service distinct from "resale") makes clear that the service provided to each class of customers must be provided over the competitors' own facilities. As the Commission observed in the *Louisiana II Order*, that conclusion is fully supported by the legislative history of the Act. *Id.* ¶ 68. Indeed, had Congress been indifferent to whether residential customers were served by competitive facilities, the subsection could have been and no doubt would have been written very differently. There would have been no need to address residential services in a subsection labeled "presence of a *facilities-based* competitor." There is no predominantly facilities-based provider of service to residential subscribers in Arkansas.

residential subscribers, and that it is SWBT's anticompetitive conduct that is to blame. Granting SWBT's application in these circumstances would not only violate the plain terms of Track A, it would subvert the entire purpose of the 1996 Act.

As the Commission has acknowledged, Section 271 reflects Congress's intent to promote facilities-based entry, and SWBT, by its conduct, has thwarted achievement of that goal.[125] To grant SWBT's application for Arkansas when *no* CLEC is providing facilities-based service to residential customers and when the only CLECs that have attempted to do so have abandoned the effort as hopeless in light of SWBT's misconduct would serve only to ensure the defeat of one of the most basic objectives of the Act: to provide the BOCs an incentive to open all three paths of entry – and not just resale – to residential competitors.

VI. SWBT'S ENTRY INTO THE INTERLATA MARKET IS NOT CONSISTENT WITH THE PUBLIC INTEREST.

There is a final, independent reason why the Commission should deny SWBT's application. Even if the Commission could rationally find that SWBT had fully implemented its obligations under the competitive checklist, including its duty to set cost-based rates within the range that a reasonable application of TELRIC would produce or to provide nondiscriminatory access to resold DSL and to its operations support systems, the record here precludes any finding that granting SWBT's application is "consistent with the public interest, convenience and necessity." 47 U.S.C. § 271(d)(3)(C).

The reason is straightforward. At the heart of the public interest inquiry, as Congress conceived it and as this Commission has explained, is a determination of whether, notwithstanding checklist compliance, the local market is in fact fully open to competition. The first step is to assess the actual state of local competition. Here, the record shows that residential

[125] *See Oklahoma I 271 Order* ¶¶ 41-43.

competition is minimal. Just over 1% of the residential lines in SWBT's Arkansas and Missouri service territories are served by CLECs via facilities- or UNE-based service. The second step thus requires a determination whether the lack of competition is attributable to the BOC's misconduct and/or persisting barriers to entry, or instead reflects neutral business considerations uniquely within the control of new entrants (such as a regional business plan that does not include entry into a particular state for business reasons apart from whether the market is open to competition). *Michigan 271 Order* ¶¶ 385-391.

This analysis of whether local markets in fact are open not only is mandated by the terms of the Act and the Commission's prior orders, but is eminently practical and provides reasonable certainty to all parties as to the relevant factors likely to determine the outcome of the public interest inquiry. Because the relevant factors here demonstrate that the local residential markets in Arkansas and Missouri remain closed to competitors, approval of this joint application is not in the public interest.

This conclusion is squarely supported by the recent findings of the Texas Public Utility Commission ("TPUC"), which underscores the adverse consequences that would result from premature interLATA authorization in Arkansas and Missouri. Report to the 77th Texas Legislature, "Scope of Competition in Telecommunications Markets in Texas" (Jan. 2001) ("*TPUC Report*"). The *TPUC Report* makes clear that even today, a year after obtaining 271 authorization in Texas, SWBT retains monopoly control of the residential local market in Texas and has raised prices for local service. CLEC competition for residential customers in Texas, while initially active, has faded, as experience has demonstrated that entry into local residential markets is not profitable. This lack of competition in Texas has permitted SWBT to extend its monopoly into the provision of bundled combinations of local and long distance services and,